

State of New Hampshire



PERSONNEL APPEALS BOARD
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Appeal of Richard Grace

Docket #2004-D-12

New Hampshire State Liquor Commission

January 10, 2005

The New Hampshire Personnel Appeals Board (Wood, Johnson¹ and Bonafide) met in public session on Wednesday, January 5, 2005, under the authority of RSA 21-I:58, to hear the appeal of Richard Grace, an employee of the NH State Liquor Commission. Mr. Grace, who appeared *pro se*, was appealing his February 2, 2004 disciplinary demotion from Retail Store Manager III, salary grade 17, to Retail Store Clerk II, salary grade 11. John Bunnell, Administrator of Marketing and Sales, appeared on behalf of the State.

The record of the hearing in this matter consists of pleadings submitted by the appellant prior to the hearing, the audio tape recording of the hearing on the merits of the appeal, and documents admitted into evidence as follows:

Appellant's Exhibits

1. Letter dated January 30, 2004 from John Bunnell to Richard Grace
2. Letter dated January 30, 2004 from John Bunnell (revised) to Richard Grace
3. Letter dated March 18, 2004 from Richard Grace to Chairman Maiola
4. Letter dated March 18, 2004 from Richard Grace to John Bunnell
5. Letter dated March 18, 2004 from Richard Grace to Sara Willingham
6. Store 66 policy and procedure on reading materials at the registers

¹ Mr. Johnson disclosed that he and Richard Gulla, one of the State's witnesses, live in the same town and are acquaintances. He indicated that it would not affect his decision-making. Neither party objected to Mr. Johnson remaining on the panel.

7. Supervisor's Meeting Minutes dated Thursday July 22, 2004
8. Memo from Rick Gerrish regarding Richard Grace's job performance
9. Memo from Larry Hammond regarding Richard Grace
10. Memo from Doug Shaw to Tony Burns concerning Mike Donovan
11. Handwritten memo from Wayne McCabe concerning Richard Grace
12. Performance Evaluation dated 1/27/99
13. Performance Evaluation dated 1/29/00
14. Store Visit Report dated 12/7/00
15. Performance Evaluation dated 2/14/01
16. Performance Evaluation dated 3/13/02
17. Performance Evaluation dated 2/21/03
18. Performance Evaluation dated 1/22/04
19. Performance Evaluation dated 10/20/04

Appellant's Exhibits 1 – 19 were admitted into the record without objection. For the record, Mr. Bunnell noted that the appellant's exhibits appeared to be offered as evidence of Mr. Grace's character. He said the appellant's character was not in dispute. The State offered no additional exhibits.

The following persons gave sworn testimony:

John R Larochelle, Assistant Director of Store Operations
Lieutenant Kyle W. Metcalf
Investigator Ernest L Beaulieu, Jr.
Richard Gulla, District Supervisor, NH State Liquor Commission
Peter A. Engel, Director of Stores
John Bunnell, Administrator of Sales and Marketing
Tony Burns, Store Supervisor/Manager
Richard Gerrish, Wine-Spirits Marketing Specialist
Wayne McCabe, Retail Store Manager I
Douglas Shaw, Retail Store Clerk (Retail Store Manager III, retired)
Richard Grace, Appellant

Narrative Summary

The NH State Liquor Commission comprises three Bureaus: Administration, Enforcement, and Marketing. The Commission operates 74 retail liquor stores throughout the State of New Hampshire. The Commission establishes and enforces policies and procedures to address operational issues ranging from customer service and product presentation to security for cash and merchandise. Store Managers are responsible for executing and enforcing Commission policies and procedures to ensure operational integrity.

In order to gauge store performance and determine the level of product protection and cash security, each store conducts a quarterly inventory by performing a complete product count and comparing that count to the computerized inventory, sales and delivery records. The stores usually experience "shrinkage" of less than a quarter of a percent, and make adjustments to their inventory control systems to address those discrepancies. When the discrepancies are significant, however, those stores with the highest percentage of loss are subject to further review, up to and including an investigation by the Enforcement Division.

Findings of Fact

1. In October 2000, Richard Grace was promoted from Retail Store Manager II to Retail Store Manager III and assigned to Store 72 on Fort Eddy Road in Concord.
2. During the third quarter of Fiscal Year 2003, the losses in Store #72 were particularly heavy, exceeding \$11 thousand in merchandise. That loss represented almost three times the rate of loss for previous quarters at that location, prompting Store Operations to notify the Enforcement Bureau and request assistance in conducting an audit and possible investigation.
3. Because the losses were so substantial, managers in Sales and Marketing and the Enforcement Bureau decided jointly to conduct a covert investigation.
4. The first step in the investigation involved a count and recount of the product types where losses were reported. Once it was determined that the losses were genuine, and not simply an inventory error, Store Operations and Enforcement decided to initiate a full investigation.
5. Sales and Marketing management visited the store after hours with Enforcement personnel and found the back room in a state of disarray, indicating extremely poor inventory management. They found that split cases were not properly marked, and it was impossible to determine what product each case contained without physically opening the cases and counting the bottles. They also noted that at one register, there were unusually high numbers of discarded lottery scratch tickets and on-line ticket redemptions.
6. In or around September 2003, a decision was made to initiate surveillance of customers and personnel in the public areas of Store 72. At the time, no particular employee was the focus of the investigation. Because the losses were so significant, the fraud unit suspected that

more than one person might be responsible for the fraud. As a result, they decided not to inform any store personnel that an investigation had been initiated.

7. Investigators reviewed store records and installed surveillance equipment in the public areas of the store in the hopes of eliminating suspects.
8. As the investigation progressed, surveillance was focused on one store employee, the Assistant Store Manager, who repeatedly was seen on camera reading books and newspapers at his workstation, as well as playing online lottery and instant scratch tickets that he purchased through his own register. The videotape also showed the employee stealing from the till using a method of scanning one bottle, bypassing the scanner with the next bottle, charging the customer the full price for both products, and pocketing the difference between the amount paid by the customer and the amount actually scanned into the computer.
9. On November 25, 2003, investigators from the Enforcement Bureau confronted the Assistant Manager with evidence of his theft from Store #72. The employee admitted what he had done. He was later charged with felony theft, convicted in Merrimack County Superior Court for theft in excess of \$1000, and dismissed from his position at the Liquor Commission. Investigators questioned Mr. Grace as well.
10. Mr. Grace met with Peter Engel on November 25, 2004 and reviewed the evidence collected during the investigation. Mr. Grace admitted that he knew his Assistant Manager was playing the lottery during work time and purchasing tickets at his own register. Mr. Grace also admitted that he knew his Assistant Manager spent time reading novels and reading the newspaper at his cash terminal. He admitted he was unwilling to strictly enforce policies prohibiting those activities, or report the violations to his own supervisor, for fear the employee would respond by calling in sick and leaving the store short-handed.
11. Mr. Grace was unaware of ongoing theft occurring at Store #72, even though he was working in close proximity to the Assistant Store Manager when some of the thefts took place.
12. Peter Engel, Director of Store Operations, recommended demoting Mr. Grace. John Bunnell, Administrator of Sales and Marketing, accepted that recommendation and took it to the Commission for consideration.
13. The Liquor Commission voted to demote Mr. Grace from Retail Store Manager III to Retail Store Clerk II. The letter notifying Mr. Grace of his demotion stated, in part, “..[Y]ou were aware and allowed Retail Store Manager I, Michael Donovan to purchase and redeem in the store, as well as online, instant scratch lottery tickets for

himself during his working hours. He was also allowed to read various novels, and daily newspapers while standing at the cash register in plain view of customers. When questioned regarding these practices at store #72 Concord, you stated that you thought it was okay to play the tickets while working and had problems getting Mr. Donovan to do as he was instructed in many areas of Store Operations Policy and Procedure. As for the inventory control at Store #72 Concord, there was a complete lack of organization of the backroom, which made an inventory loss environment even harder to control, detect and verify."

14. By letter dated January 30,2004, the appellant, Richard Grace, was demoted from Retail Store Manager III, salary grade 17, to Retail Store Clerk II, salary grade 11, based upon his failure to properly enforce Commission policies and procedures for management of store personnel, inventory control, and security for merchandise and cash.
15. The Liquor Commission determined there was sufficient evidence of the appellant's failure to meet work standards and carry out his assigned duties and responsibilities to justify demoting him to a position without managerial responsibilities.

Position of the Parties

Mr. Grace argued that the Liquor Commission failed to employ progressive discipline and should have given him a verbal or a written warning rather than demoting him six labor grades. He argued that demotion was too severe a punishment for simply allowing someone to read at his workstation, and suggested that he actually was being held responsible for theft committed by another store employee. He argued that if the Commission had given him complete and timely notice of their concerns, he could have worked with Stores personnel to correct those deficiencies.

Mr. Grace provided witnesses to attest to his character and work ethic. He also noted that although he believed the demotion was inappropriate, he found the opportunity for retraining to have been a valuable refresher. He observed that all employees probably needed to be "tweaked" from time to time, and said that he'd "learned his lesson."

Mr. Bunnell argued that the Commission had never questioned Mr. Grace's character or work ethic. He also applauded the appellant's decision to view the demotion and reassignment as an opportunity to improve his skills.

Mr. Bunnell argued that in order to maintain and improve its profitability, the Liquor Commission must ensure that all employees follow the appropriate policies and procedures. As a Store Manager, he argued, Mr. Grace was responsible for directing the employees, providing customer service, and managing overall store profit, as well as communicating with his immediate supervisor whenever concerns arose about store operations. He argued that Mr. Grace's failure to manage the inventory and enforce the Commission's Policies and Procedures had created the environment in which significant losses could and did occur. Therefore, he argued, when the appellant demonstrated weak managerial skills, the Commission acted appropriately in demoting him to a non-managerial position where he could develop those skills.

Rulings of Law

- A. Per 1001.07 (a) (3) a. and Per 1001.07 (b) of the NH Code of Administrative Rules authorizes an appointing authority to demote an employee for failure to meet any work standard, provided that the appointing authority first offers to meet with the employee to present whatever evidence the appointing authority believes supports the decision to demote the employee and provides the employee an opportunity at the meeting to refute that evidence.
- B. The NH State Liquor Commission complied with the provisions of Per 1001.07 in demoting Mr. Grace from Retail Store Manager III to Retail Store Clerk II.
- C. NH RSA Chapter 21, Section 21-I:58, I. provides, in part, that, "In all cases, the personnel appeals board may reinstate an employee or otherwise change or modify any order of the appointing authority, or make such other order as it may deem just."
- D. The facts in evidence mitigate in favor of a modification of the order of the appointing authority, as authorized by NH RSA Chapter 21, Section 21-I:58, I, that will provide for a more appropriate and equitable level of discipline under the provisions of Per 1001.07 of the NH Code of Administrative Rules.

Decision and Order

After consideration of all the evidence and witness testimony, the Board asked Mr. Bunnell and Mr. Grace to meet briefly, review the options, and determine if the parties could agree upon a more appropriate sanction. After a brief off-the-record discussion, the parties agreed that a less severe discipline may have been appropriate, particularly in light of the appellant's admission that he had benefited from reassignment and mentoring by his new manager.

The Board then determined that there were sufficient grounds for discipline in that the appellant had not exercised sufficient managerial oversight in his role as the Retail Store Manager III at Store 72 to ensure his employees' conformance to Commission policies and procedures, and maintain appropriate inventory control procedures to avoid substantial and costly losses. While the Board found that the Commission acted appropriately in deciding to demote the employee, the Board found that the extent of the demotion was too severe. The Board voted unanimously to order the Commission to modify its January 30, 2004 decision by demoting Mr. Grace from Retail Store Manager III to Retail Store Manager I rather than Retail Store Clerk II. Such demotion shall be retroactive to the date of the original demotion and shall take effect immediately. The Board further directs the Commission to reinstate that portion of the appellant's lost wages for the period of demotion that represents the difference in pay between Retail Store Clerk II (salary grade 11) and Retail Store Manager I (salary grade 13).

In the event that there is not a position of Retail Store Manager I available into which the appellant can be transferred, the Board directs the Commission to request that the Director of Personnel approve a temporary reallocation of the appellant's current position, or a vacant position, to Retail Store Manager I, to facilitate reimbursement of wages retroactive to the original date of demotion. If the appellant should vacate the temporarily reclassified position, it shall revert to its original classification and salary grade, unless otherwise ordered by the Director of Personnel.

Therefore, as set forth above, the Appeal of Richard Grace is GRANTED IN PART.

THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD



Patrick H. Wood, Chairman



Robert J. Johnson, Commissioner



Philip P. Bonafide, Commissioner

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